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No. 1062

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In the Supreme Court of the United States

October Term, 1962

STATES MARINE LINES, INC., PETITIONER

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA AND INTERNATIONAL CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

[redacted]

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OPINIONS BELOW

The opinion of the court of appeals is reported at 313 F. 2d 906. The opinion of the Federal Maritime Commission is reported unofficially at 1962 Am. Mar. Cas. 743.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1963 (Pet. A-1), and rehearing was denied on February 7, 1963 (Pet. 2). The petition for a writ of certiorari was filed on May 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Maritime Commission—finding that petitioner, a common carrier by water, had refused to enter into an exclusive-patronage dual-rate contract with Isbrandtsen Co. which would have entitled Isbrandtsen to ship at lower rates than nonecontracting shippers—ordered petitioner to return to Isbrandtsen the amounts in excess of the lower contract rate which it had paid.

The questions presented are as follows:

1. Whether there was substantial evidence to support the Commission's findings that Isbrandtsen had been discriminatorily denied an exclusive-patronage contract and that the measure of its damages was the additional charge which it was therefore required to pay.

2. Whether the Commission and the court of appeals properly concluded that the exclusive-patronage contract used by petitioner in 1952 did not require a shipper to own the goods shipped in order to obtain the lower contract rate.

3. Whether the court of appeals erred in requiring the Commission to award Isbrandsten interest from the date its complaint before the Commission was filed.

STATUTE INVOLVED

Section 17 of the Shipping Act, 1916, 46 U.S.C. 816, provides:

> No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prej-

judicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Section 22 of the Shipping Act, 1916, 46 U.S.C. 821, provides:

> Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

STATEMENT

Petitioner, a common carrier by water, is a member of the Far East Conference, a voluntary association of common carrier steamship lines engaged in the transportation of property between various American and foreign ports. The Conference operates pursuant to a general or basic agreement first approved by the United States Shipping Board[1] in 1922 (J.A. 7). It extensively employs dual-rate contract systems, under which shippers who agree to deal exclusively with Conference members, and not with independent carriers in the trade served by the Conference, receive the benefit of rates lower than those charged shippers who do not so agree. The systems are established by agreement among members of the Conference. See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481. In 1950 the Conference initiated a dual-rate system for the transportation of cotton (Pet. 5–6).

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[1] The Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, established the United States Shipping Board to administer the new law. In 1933 the Shipping Board was abolished. Its functions were transferred to the Department of Commerce and in 1936 were assigned to the United States Maritime Commission, which in 1950 was in turn replaced by the Federal Maritime Board. See *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 886–87 n.7 (S.D.N.Y.), affirmed by an equally divided Court *sub nom. Rederi* v. *Isbrandtsen Co.*, 342 U.S. 950. Under Section 103 of Reorganization Plan No. 7 of 1961, 26 Fed. Reg. 7315, the five-member Federal Maritime Commission succeeded to the regulatory powers and duties of the Maritime Board, which was abolished by Section 304 of the Plan. For convenience we shall refer to the agency as the Commission regardless of the date involved.

In 1952 Isbrandtsen Co., a leading independent carrier operating, *inter alia*, in the trade served by the Far East Conference, contracted with one Kempner, a major cotton shipper not a party to an exclusive-patronage contract with the Conference, to transport certain shipments from Houston to Japan at a rate 10 percent lower than the Conference contract rate. Finding itself unable to obtain a vessel in which to transport the cotton, Isbrandtsen booked the cargo in its own name with petitioner and with Waterman S.S. Corp. in Houston (Pet. 6–7; J.A. 123).

Isbrandtsen, which has frequently done business as a merchant as well as a carrier (Pet. A–2), had at one time been a party to an exclusive-patronage contract with the Conference, but its contract had expired (J.A. 129–130). When petitioner and Waterman refused to carry the cotton at the lower rate, Isbrandtsen offered to sign a new exclusive-patronage contract (J.A. 130). Both carriers declined the offer, directing Isbrandtsen to apply to the office of the Conference Chairman in New York (Pet. 7; cf. Pet. A–4, fn.5). Petitioner also informed Isbrandtsen that even if it were to sign an exclusive-patronage contract the shipments in question would not be carried at the contract rate since Kempner, the owner of the cotton, was a nonconference shipper (*ibid.*).

Isbrandtsen paid the higher noncontract rate under protest and in November 1952 filed with the Federal Maritime Commission a complaint seeking reparations from petitioner and Waterman (Pet. 6, A–3). The Commission consolidated the complaint for hearing with similar complaints filed by Kempner in con-

nection with its own shipments on petitioner's and others' vessels. The complaints attacked the legality of this and another dual-rate system on the ground that they had never been approved by the Commission. In 1957, after hearings, the examiner submitted a recommended decision. In 1959, after oral argument before it, the Commission postponed resolution of the controversy until the completion of the litigation culminating in the decision of this Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481. After further argument, (J.A. 121–122), the Commission, then consisting of two members, issued its report on August 9, 1961.

The Commission ordered the payment of reparations to Isbrandtsen.[2] It found that the carriers' refusal to accept Isbrandtsen's offer to sign an exclusive-patronage contract and to carry the proffered shipments at contract rates constituted unjust discrimination between shippers in violation of Section 17 of the Shipping Act, 46 U.S.C. 816 (J.A. 119, 148). Noting that Isbrandtsen had absorbed the difference

[2] The Commission concluded that Kempner, however, was not entitled to reparations for the amounts paid to petitioner and other carriers in excess of contract rates. Kempner petitioned for review of that portion of the order. The United States confessed error and urged reversal. The court of appeals agreed and remanded the case to the Commission for assessment of reparations. The members of the Far East Conference, including petitioner here, as well as the Gulf-Mediterranean Ports Conference and its members, have petitioned for certiorari to review that decision. *Gulf-Mediterranean Ports Conference* v. *Federal Maritime Commission*, No. 1002, this Term; *Far East Conference* v. *United States*, No. 1138, this Term.

(J. A. 132), it found damages equal to the differential between the rate paid by Isbrandtsen and the rate to which it would have been entitled under an exclusive patronage contract (J.A. 148). Interest on the award was allowed by the Commission at 6 percent on any amount unpaid after 60 days from the date of its order (J.A. 149).

Although Waterman chose not to pursue the matter further, petitioner sought review of the Commission's order in the court of appeals. Isbrandtsen filed a petition in the same court to review the Commission's denial of interest from the date of the carriers' wrongful actions (J.A. 6, 10). The court of appeals ruled that there was substantial evidence to support the Commission's finding that petitioner had refused to allow Isbrandtsen to execute a shipper's contract (Pet. A-3—A-4). The court concluded, moreover, that the contract used by petitioner at the time of the shipments entitled a signatory shipper to the lower contract rate regardless of whether he owned the goods shipped, and that since Isbrandtsen was neither agent nor broker for Kempner the shipments did not fall within the exclusionary clause of the contract as then written (Pet. A-4 and fn. 6). Thus, it rejected petitioner's contention that Isbrandtsen could in no event have obtained the lower contract rate. Finally, the court held that in light of (i) previous Commission cases awarding interest from the date of the shipment when an overcharge has been paid and (ii) Isbrandtsen's waiver of interest prior to the filing of its complaint, interest should have been granted from the latter date. Neither the Commission nor the United

States has asked this Court to review the decision of the court below on the question of interest.

ARGUMENT

The decision below correctly affirmed the Commission's finding that petitioner was guilty of discrimination in refusing Isbrandtsen an exclusive-patronage contract and that, in the circumstances of this case, the damages thereby caused were equal to the difference between the rate paid and the contract rate to which Isbrandtsen was entitled. And while we believe that the court of appeals erred in requiring the Commission to award interest from the date of the shipments in question, we do not deem that error of sufficient importance to warrant review here.

1. Finding (J.A. 131) that the shippers of all other cotton on board petitioner's vessels which carried Isbrandtsen's cargo had been granted the contract rate, the Commission properly concluded that the higher rate charged Isbrandtsen was unjustly discriminatory (J.A. 148). This basis of the Commission's discrimination finding, though completely ignored by petitioner, was found by the court of appeals to be supported by substantial evidence (Pet. A–4) and hence does not require further review. Cf. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.

2. Petitioner urges (Pet. 12–13) that the dual-rate contract it used in 1952 would not have entitled Isbrandtsen to the lower contract rate for the shipments in question since it contained a provision stipulating that the nominal shipper was not the "agent

or broker" for any principal, whether disclosed or undisclosed. We believe that the court of appeals (Pet. A-2, A-4, fn. 6) was correct in concluding that Isbrandtsen was not an "agent or broker" within the meaning of the contract. In any event, as petitioner recognizes (Pet. 12), the Commission now has before it proposed rules relating to the operation of dual-rate systems, including a proposed form of shipper's contract which it considers to be lawful and which all carriers would be encouraged to adopt. Since the proposed standard contract differs significantly in terminology from petitioner's 1952 contract,[1] and since, if adopted by the Commission, it would almost certainly gain wide acceptance among carriers, the interpretation of the 1952 contract has little continuing importance.

3. In any event, the decision of the court below in *Kompner* v. *Federal Maritime Commission*, 313 F. 2d 586, makes it unnecessary for this Court to resolve the questions (a) whether petitioner was guilty of discrimination and (b) whether Isbrandtsen would have been entitled, under the terms of the 1952 contract

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[1] Article 11 (Pet. 8) of the 1952 contract form provides:

"It is agreed that the party herein referred to as the Shipper is not the agent or broker for any principal, whether disclosed or undisclosed, and that no party who is not named herein or at the foot hereof shall have any rights as Shipper by virtue hereof."

[2] Article 2(d) (Pet. 12) of the proposed contract form is not limited to the exclusion of shipments as to which the shipper acts as agent or broker, but rather makes clear that:

"Merchant warrants that it will not permit any goods to be transported under this agreement at the contract rates herein provided on behalf of any interest which is not bound by a Merchant's Rate Agreement with the Conference."

form, to the lower contract rate on the shipments involved here. In *Kempner*, the court of appeals held that the dual-rate system on cotton employed by petitioner in 1952 was illegal because it lacked approval by the Commission. Two petitions for certiorari have been filed to review that decision. The Commission is of the view that in *Kempner* the court of appeals erred, and is therefore supporting the petitions in that case. The United States, however, for reasons stated in its brief in opposition to those petitions, believes that the court of appeals was correct. If, as held in *Kempner*, the dual-rate system involved here was illegal for want of Commission approval, Isbrandtsen would have been entitled to claim reparations on the same grounds which were upheld by the court below with respect to the Kempner respondents.

4. Petitioner argues that Isbrandtsen was not entitled to reparations measured by the differential by the contract and noncontract rates, since it failed to prove that the carrier's discriminatory refusal to sign an exclusive-patronage, dual-rate contract resulted in competitive market injury (Pet. 14-15). That issue, however, is without current significance and does not require resolution by this Court. Since the adoption of the 1961 amendments to the Shipping Act, a shipper who has improperly been denied a contract, without resorting to the discrimination provision (46 U.S.C. 816), could recover reparations on the theory that the carrier's action constituted an "overcharge"

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(Section 18(b)(3), 46 U.S.C. 817(b)(3)), thus avoiding the issue raised by petitioner here. We are aware of no cases presently pending before the Commission which would require determination of this question with respect to a claimant in the unique position of Isbrandtsen as both a shipper and a carrier. Moreover the two-year period of limitations which governs reparations claims under the Shipping Act (46 U.S.C. 821) will shortly expire with respect to claims controlled by the pre-1961 statute. Hence, we submit, the question of the proper measure of damages for discrimination in circumstances like those at bar is of merely academic interest and does not justify the grant of certiorari.

5. The United States and the Commission agree with petitioner that the court below erred in reversing the Commission's exercise of discretion not to award Isbrandtsen interest on its damages from the date of the illegal discriminations. However, the question of the scope of the Commission's discretion in awarding interest has not arisen often enough to require resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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